A

JKL v ABC & Anor

B HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24F-363–11 OF 2021
SM KOMATHY J
24 MAY 2022

C *Family Law — Children — Paternity — Proof of — Plaintiff's action by originating summons for child to undergo DNA testing — Plaintiff claimed to be birth father of child adopted by defendants — Defendants instituted writ action against plaintiff for defamation and harassment — Originating summons heard together with writ action — Whether originating summons for DNA test could be* D *heard first — Whether High Court had jurisdiction or power to order DNA tests to determine paternity — Whether DNA testing ought to be ordered*

The plaintiff was an Algerian national. The defendants were the adoptive E parents of a seven-year-old child ('the child'). The child's biological mother, an unmarried mother, gave birth to the child on 2 February 2016. The plaintiff was present at the hospital and was allowed to see the child, but the next day, the biological mother got herself discharged and left with the child without informing the plaintiff. On 12 February 2016, the biological mother informed F the plaintiff that she had given up the child for adoption and the plaintiff started to look for the child. In the meantime, the defendants had formally adopted the child. The plaintiff found out about the adoption and continued to post publicly claiming to be the father of the child. This prompted the defendants to institute proceedings against him in the Shah Alam High Court G ('the writ action') for, inter alia, defamation and harassment. The plaintiff had brought this action by originating summons ('the OS') in the Kuala Lumpur Family High Court claiming he was the birth father of the child, and prayed, inter alia, for the child to undergo DNA testing to determine paternity. On the application of the defendants, the OS was transferred to the Shah Alam High H Court and ordered to be heard together with the writ action. The plaintiff applied for the OS to be heard first and a decision made on the basis of the affidavit evidence filed in support and opposition. The defendants opposed the said application.

I **Held:**

(1) The two actions did not arise out of the same transaction nor did common questions of fact or law arose in both. The plaintiff by his OS sought for a DNA test to be done on the basis of the biological mother's admission that he was the biological father. On the other hand, the

defendants' writ action against the plaintiff was premised on the tort of defamation and harassment. The two actions were not related actions as there was no nexus between them. The defendants' objection was therefore overruled as it was not possible for an OS and writ action to be heard together in the absence of a direction from the Kuala Lumpur High Court for the OS to be converted into a writ action (see paras 30 & 32).

(2) There was no legislative provision in this country on the power of the High Court to order DNA tests to determine paternity. However, a judge of the High Court had inherent power to order DNA testing in disputed paternity cases. Inherent jurisdiction was a jurisdiction of long standing which has been used in a wide variety of ways to augment statutory powers and was resorted to in cases where the absence of a remedy would lead to injustice and leave individuals bereft of a remedy. Accordingly, the court had the inherent power to order DNA testing in disputed paternity cases (see paras 33 & 35–36).

(3) The test in relation to DNA testing in paternity cases was child-centric and responsive to the needs of children. The child's interests must be the touchstone. A DNA test could be ordered whenever it was in the best interests of the child to do so (see para 40).

(4) The plaintiff had a strong prima facie evidence that he was the biological father. The plaintiff had produced adequate corroborative evidence to show that there was a good possibility that he was the birth father, and only a DNA test could confirm conclusively the veracity of his claim. A child's best interests did not lie in depriving its biological father or mother of their right to consent to his adoption. If indeed the plaintiff was the biological father, permitting the adoption of the child without his consent would represent a denial or interference with his rights to raise the child and the child's right to be raised by his biological father. In the circumstances, it could not be argued that as the adoption order was not open to challenge, a DNA test would not be in the best interest of the child. Next, the plaintiff had made previous applications for the child to undergo DNA testing, but those applications were either withdrawn or struck out without being heard on the merits. As such, estoppel did not apply in favour of the defendants because estoppel only prohibited a cause of action from being re-litigated between the same parties. Therefore, it would be in the best interests of the child to order a DNA test. It was further ordered that the plaintiff be declared as the birth father if the test showed that he was the father (see paras 43, 49–51 & 54–55).

[Bahasa Malaysia summary

Plaintif adalah seorang warganegara Algeria. Defendan adalah ibu bapa angkat kepada seorang kanak-kanak berumur tujuh tahun ('anak'). Ibu kandung anak itu, seorang ibu yang belum berkahwin, telah melahirkan anak itu pada 2

Februari 2016. Plaintif telah hadir di hospital dan dibenarkan berjumpa dengan anak itu, tetapi keesokan harinya, ibu kandung itu dibenarkan pulang dan pergi bersama anak itu tanpa memberitahu plaintif. Pada 12 Februari 2016, ibu kandung memaklumkan plaintif bahawa dia telah menyerahkan anak tersebut untuk diambil sebagai anak angkat dan plaintif mula mencari anak tersebut. Sementara itu, defendan telah secara rasmi mengambil anak angkat itu. Plaintif mendapat tahu tentang pengangkatan itu dan terus menyiarkan secara terbuka mendakwa sebagai bapa kepada anak itu. Ini mendorong defendan untuk memulakan prosiding terhadapnya di Mahkamah Tinggi Shah Alam ('tindakan writ') kerana, antara lain, fitnah dan gangguan. Plaintif telah membawa tindakan ini melalui saman pemula ('SP') di Mahkamah Tinggi Keluarga Kuala Lumpur mendakwa dia adalah bapa kandung anak itu, dan memohon, antara lain, untuk anak itu menjalani ujian DNA untuk menentukan paterniti. Atas permohonan defendan, SP telah dipindahkan ke Mahkamah Tinggi Shah Alam dan diperintahkan untuk didengar bersama dengan tindakan writ. Plaintif memohon supaya SP didengar terlebih dahulu dan keputusan dibuat berdasarkan keterangan afidavit yang difailkan sebagai sokongan dan bantahan. Defendan menentang permohonan tersebut.

Diputuskan:

(1) Kedua-dua tindakan itu tidak timbul daripada transaksi yang sama mahupun persoalan fakta atau undang-undang yang timbul dalam kedua-duanya. Plaintif melalui SP memohon ujian DNA dilakukan atas dasar pengakuan ibu kandung bahawa dia adalah bapa kandung. Sebaliknya, tindakan writ defendan terhadap plaintif adalah berdasarkan tort fitnah dan gangguan. Kedua-dua tindakan itu bukan tindakan berkaitan kerana tidak ada hubungan antara mereka. Oleh itu bantahan defendan telah ditolak kerana tidak mungkin untuk SP dan tindakan writ didengar bersama sekiranya tiada arahan daripada Mahkamah Tinggi Kuala Lumpur supaya SP ditukar kepada tindakan writ (lihat perenggan 30 & 32).

(2) Tiada peruntukan perundangan di negara ini mengenai kuasa Mahkamah Tinggi untuk memerintahkan ujian DNA untuk menentukan paterniti. Walau bagaimanapun, seorang hakim Mahkamah Tinggi mempunyai kuasa sedia ada untuk memerintahkan ujian DNA dalam kes paterniti yang dipertikaikan. Bidang kuasa sedia ada ialah bidang kuasa yang telah lama wujud yang telah digunakan dalam pelbagai cara untuk menambah kuasa berkanun dan digunakan dalam kes di mana ketiadaan remedi akan membawa kepada ketidakadilan dan menyebabkan individu kehilangan remedi. Sehubungan itu, mahkamah mempunyai kuasa sedia ada untuk memerintahkan ujian DNA dalam kes paterniti yang dipertikaikan (lihat perenggan 33 & 35–36).

(3) Ujian berhubung dengan ujian DNA dalam kes paterniti adalah berpusatkan anak dan responsif kepada keperluan anak. Kepentingan anak mesti menjadi kayu ukur. Ujian DNA boleh diperintahkan pada bila-bila masa kepentingan terbaik anak untuk berbuat demikian (lihat perenggan 40).

(4) Plaintif mempunyai keterangan prima facie yang kukuh bahawa dia adalah bapa kandung. Plaintif telah mengemukakan keterangan kukuh yang mencukupi untuk menunjukkan bahawa terdapat kemungkinan yang baik bahawa dia adalah bapa kandung, dan hanya ujian DNA yang boleh mengesahkan secara muktamad kebenaran tuntutannya. Kepentingan terbaik anak tidak tercapai dalam merampas hak bapa atau ibu kandungnya untuk bersetuju dengan pengangkatannya. Jika memang plaintif adalah bapa kandung, membenarkan pengambilan anak itu tanpa persetujuannya akan mewakili penafian atau campur tangan haknya untuk membesarkan anak itu dan hak anak itu untuk dibesarkan oleh bapa kandungnya. Dalam keadaan itu, ia tidak boleh dipertikaikan bahawa kerana perintah pengangkatan tidak terbuka untuk dicabar, ujian DNA tidak akan menjadi kepentingan terbaik anak itu. Seterusnya, plaintif telah membuat permohonan sebelum ini untuk anak itu menjalani ujian DNA, tetapi permohonan itu sama ada ditarik balik atau dibatalkan tanpa didengari dari segi merit. Oleh itu, estoppel tidak terpakai memihak kepada defendan kerana estoppel hanya melarang kausa tindakan daripada dibicarakan semula antara pihak yang sama. Oleh itu, adalah untuk kepentingan terbaik anak itu untuk diperintahkan ujian DNA. Selanjutnya diperintahkan bahawa plaintif diisytiharkan sebagai bapa kandung jika ujian menunjukkan bahawa dia adalah bapa (lihat perenggan 43, 49–51 & 54–55).]

Cases referred to

Barraclough, Re [1967] P 1 (refd)

Bhabani Prasad Jena v Convenor Secretary, Orissa State Commission for Women & Anr (2010) 8 SCC 633, SC (refd)

CAS v MPPL & Anor [2019] 4 MLJ 243, CA (refd)

Dipanwita Roy v Ronobroto Roy (2015) 1 SCC 365, SC (refd)

G v H (1994) 181 CLR 387; (1994) 124 ALR 353; (1994) 18 Fam LR 180, HC (refd)

Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik [2013] 4 MLJ 272, HC (refd)

Rohit Shekhar v Narayan Datt & Anor (FAO(OS) No 547/2011) (unreported), HC (refd)

Sean O' Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137; [2011] 3 CLJ 722, FC (refd)

Legislation referred to

Adoption Act 1952 ss 5(1), 9, 25(12)
Evidence Act 1950 s 112
Guardianship of the Infants Act 1961 s 5
Married Women and Children (Maintenance) Act 1950 s 3(2)

Xenia Lok Zou Chieh (Ang & Xen) for the plaintiff.
Honey Tan Lay Ean (with Tay Kit Hoo) (Tan Law Practice) for the defendant.

SM Komathy J:

INTRODUCTION

[1] The plaintiff is an Algerian national. The defendants are the adoptive parents of a seven year old child ('the child'). The plaintiff has brought this action by originating summons ('the OS') claiming he is the birth father of the child, and prays, inter alia, for the child to undergo DNA testing to determine paternity. The plaintiff alleges the child was given up for adoption by the biological mother without his consent.

[2] On 7 March 2022, the plaintiff withdrew most of the reliefs prayed for in the OS save and except for the following:

> (2) Satu ujian Deoxyribo Nucleic Acid ('DNA') dijalankan ke atas plaintif dan GHI ('anak itu') (dahulunya Matthew James Lim dengan No sijil kelahiran: ...) atas syarat-syarat yang berikut:
>
> (a) Ujian DNA dijalankan di hospital kerajaan dengan kehadiran peguamcara plaintif serta kehadiran peguamcara defendan pertama DNA defendan ke-2; dan
>
> (b) Keputusan ujian DNA tersebut akan didedahkan dalam kehadiran peguamcara plaintif serta kehadiran peguamcara defendan pertama dan ke-2.
>
> (3)(d) Apa-apa perintah selanjutnya dan/atau selainnya yang didapati sesuai dan dikira berpatutan oleh Mahkamah yang mulia ini.

BACKGROUND

[3] The child's biological mother, an unmarried mother, gave birth to the child on 2 February 2016. The plaintiff was present at the hospital and was allowed to see the child, but the next day, the biological mother got herself discharged and left with the child without informing the plaintiff.

[4] The plaintiff tried to reach her on her handphone, but to no avail. However, on 12 February 2016, the biological mother phoned and informed

him that she had given up the child for adoption but refused to divulge any further details. Thereupon, the plaintiff started to look for the child.

[5] In the meantime, on 30 March 2016, the defendants applied to the Shah Alam Sessions Court and obtained an interim adoption order to adopt the child. They formally adopted the child on 17 June 2016. Sometime in October 2016, the defendants became aware of the plaintiff's existence when he posted on social media that he was looking for the child and that he was the biological father.

[6] In early 2017, the plaintiff found out about the adoption order after conducting a search on the court file in the Shah Alam Sessions Court. He then appointed solicitors who filed an application to set aside the adoption order, but the same was subsequently withdrawn.

[7] The plaintiff continued to post publicly claiming to be the father of the child. This prompted the defendants to institute proceedings against him in the Shah Alam High Court BA-22F-3–11 of 2019 ('the writ action') for, inter alia, defamation and harassment.

[8] The plaintiff by his defence and counterclaim denied the claim and sought for a DNA test to be carried out to prove that he was the biological father. The plaintiff also at the same time filed an originating summons in the Shah Alam High Court for a DNA test. The originating summons was later withdrawn. On 11 March 2020, the plaintiff filed a similar application which was also subsequently withdrawn.

[9] Six days later, on 17 March 2021, the plaintiff's counterclaim for a DNA test was struck out for non-compliance with an order for payment of security for costs made in the writ action. This prompted the plaintiff to file a motion in the Federal Court to seek for a review of the adoption order. On 6 July 2021, the Federal Court dismissed the motion.

[10] Undeterred, the plaintiff on 14 July 2021, filed an application in the Shah Alam Sessions Court for leave to intervene to set aside the adoption order on the ground that the order had been made without his knowledge and consent. The learned sessions judge struck out the application with no liberty on the ground that she was functus officio and had no jurisdiction to set aside the order.

[11] The plaintiff then filed the present OS in the Kuala Lumpur Family High Court on 2 September 2021. On the application of the defendants, the OS was subsequently transferred to the Shah Alam High Court and ordered to be heard together with the writ action. The plaintiff now applies for the OS to

be heard first and a decision made on the basis of the affidavit evidence filed in support and opposition. The defendants oppose the said application.

[12] Against that background, I now turn to the parties' submissions.

THE PARTIES' SUBMISSIONS

Case for the plaintiff

[13] The plaintiff contends that there is simply no nexus between his OS for a DNA test and the defendants writ action for defamation. He says that in the absence of nexus, it is illogical and makes no sense for his application for DNA testing to be heard together with the writ action for damages and injunctive relief. He urges the court to thus hear and determine the OS first, notwithstanding the court order for both cases to be heard together.

[14] On the merits, the plaintiff's case is very straightforward. He contends that there is sufficient evidence to support his assertion he is the birth father. He says that he was at the hospital when the child was born, and not long thereafter, the biological mother had acknowledged his paternity in one of her emails to the adoption agency and a police report she made. He submits that consequently it is not open to the defendants and biological mother to now deny his biological ties to the child and the only way to verify this is by conducting a DNA test.

[15] The plaintiff further argues that articles 7, 8, 9 of the United Nations Convention on the Rights of the Child ('UNCRC') mandate that the best interests of children require that they have a right to know who their biological parents are. He says it would be in the child's best interests to know that he is the birth father and only DNA testing can resolve the issue conclusively and the truth ascertained.

[16] The plaintiff next submits that s 5 of the Guardianship of the Infants Act 1961 confers parental rights and duties on the biological parents of an illegitimate child. He relies on the decision of the Federal Court in *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137; [2011] 3 CLJ 722 where it was clarified that the Guardianship of the Infants Act 1961 applies to illegitimate children as well. The plaintiff argues only a DNA test would show if he has been unfairly and wrongfully denied his statutory right to consent to the child's adoption. He says that he has never relinquished his parental rights and had not consented to the adoption.

Case for the defendant

[17] The defendants contend that in light of the order made by the Kuala Lumpur High Court (at para [12]), the two actions must be heard together and a decision can be made only at the conclusion of the trial after evidence has been heard. In the alternative, they submit that if the court does not agree, then the court must dismiss the OS as it is rife with disputed facts in relation to his assertion he is the birth father.

[18] The defendants next argue that the email sent by the biological mother does not constitute conclusive evidence that the plaintiff is the biological father as the same was not made under oath. They point out that subsequent to the email, the biological mother had affirmed an affidavit ('affidavit') to oppose the plaintiff's application made to the Federal Court case (at para [11]) wherein she has explained on oath that she was not having an exclusive relationship with the plaintiff at the material time, but was seeing other men as well. The defendants also say the plaintiff is not entitled to rely on the biological mother's police report as the same was produced as an exhibit for the purposes of the writ action, and not the OS proceedings.

[19] The defendants accept that the provisions in the UNCRC mandate that in actions involving children the paramount consideration is the best interests of the child. They contend that in the instant case, however, it will not be in the best interests of the child to order a DNA test as it will cause emotional upheaval to the child who has now been with them for more than six years. The defendants say that it is in the best interests of the child to grow and thrive in their care as it is not known how he would cope, and react, if he were to be uprooted from his present home and familiar surroundings.

[20] The defendants also contend that the adoption decree in this case is final and cannot be set aside. They point out that the Federal Court in *Sean O' Casey Patterson v Chan Hoong Poh & Ors* (at para [16]) held that the biological mother of an illegitimate child has the right to give up her child for adoption without the consent of the biological father when his identity is not known. They submit that thus the biological mother of the child had the right to give him up for adoption, and when the adoption decree was made, all parental rights of the biological parents of the child became extinguished. The defendants submit that it will be an exercise in futility to grant a DNA test as even if the plaintiff is the biological father, he no longer has any rights over the child.

[21] The defendants further argue that the plaintiff is estopped from seeking for a DNA test as the Shah Alam Sessions Court on 28 July 2021, had refused his application for a DNA test, and leave to intervene to set aside the adoption

decree. The defendants submit that as the plaintiff did not appeal against the decision, he is now estopped from seeking for the same relief to challenge the validity of the adoption order.

[22] The defendants additionally say that in all his previous applications the plaintiff has never sought for custody nor offered to pay any maintenance for the child, but, merely prayed for a say in the child's education, religion and that he be allowed to take the child overseas. The defendants submit this demonstrates that the plaintiff's allegation that the DNA test is primarily for the welfare of the child is not true and that he is only thinking about himself.

[23] The defendants lastly argue that a DNA test will not serve any interests of the child as he is only seven years of age. They contend that even if the plaintiff is found to be the biological father, it is not for the plaintiff to force his way into the child's life overriding the wishes of the defendants who are now his legal parents. The child can obtain information about his biological parents when he comes of age as provided in s 25(12) of the Adoption Act.

The United Nations Convention on the Rights of the Child

[24] The United Nations Convention on the Rights of the Child is an international agreement on child rights. The Government of Malaysia has been a signatory to this Convention since 1995 and accepted the provisions therein but expressed reservations with respect to articles 1, 2, 7, 13, 14, 15, 28, (para 1(a)) and 37. It went on to record a caveat to the effect that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.

[25] The articles the parties rely on are in these terms:

(a) article 3(1):

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(b) article 7(1):

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

(c) article 8(1):

> Parties undertake to respect the right of the child to preserve his or her

identity, including nationality, name and family relations as recognized by law without unlawful interference.

(d) article 8(2):

Where a child is illegally deprived of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

(e) article 9(1):

State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine ... that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such has one involving abuse and neglect of the child ...

(f) article 9(2):

In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

(g) article 9(3):

State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Biological mother's email, police report and affidavit

[26] It will be helpful if I also set out the documents referred to in the parties' submissions, namely the biological mother's email, police report and affidavit. The email states:

Dear orphancare, Hi I'm RML (redacted biological mother's name) a birth mother who last Feb got your assistance in finding home for my son. If you can please contact his adoptive parents to look after him as the biological father has been harassing me non-stop ...

[27] The police report reads:

Bekas teman lelaki saya sering menggangu saya. Saya dengan bekas teman lelaki saya mempunyai seorang anak lelaki dan beliau hendak mengambil anak tersebut ...

[28] Her affidavit contains these averments:

(1) ... I deny that the applicant is the 'natural and biological father' of the child and he has no basis to call the child his 'son' throughout the said AIS.

(2) ... I deny the narrative put forth by the applicant. I am advised by my solicitors and I verily believe and state that the Sessions Court Adoption

Proceedings and the subsequent Adoption Order was legally and procedurally sound at all material times.

(3) The applicant and I had only dated for only about one or two months before I came to know about my pregnancy. I was also casually dating other man besides the applicant at this time.

(4) To be frank, I was only with the applicant because I hoped he would be able to provide for the child.

(5) With regard to the photos of my pregnancy exhibited under Exhibit DR 2, I would periodically send photos of my pregnant belly to the applicant because I saw no harm in sharing the progress with him, as I would with.

(6) I reiterate that the applicant was aware about the adoption at all material times.

(7) Paragraph 25.5 of the applicant's AIS is specifically denied. I never knew about the applicant's whereabouts. There was no need for me to even contact the applicant on matters relating to the child since he has no legal rights over the child.

Whether OS for DNA test can be heard first

[29] In the instant case, it is pertinent to point out that though Kuala Lumpur High Court gave an order for the OS and writ action to be heard together, there was no direction given for the OS to be converted into a writ action. It is trite that an originating summons is decided on the basis of affidavit evidence.

[30] The defendants contend that the Kuala Lumpur High Court ordered both actions to be heard together as the OS is rife with disputed facts and the question of whether a DNA test ought to be ordered can be determined only after evidence is heard. With respect, I am unable to agree. It is essential to note that the two actions do not arise out of the same transaction nor do common questions of fact or law arises in both. The plaintiff by his OS seeks for a DNA test to be done on the basis of the biological mother's admission that he is the biological father. On the other hand, the defendants writ action against the plaintiff is premised on the tort of defamation and harassment.

[31] It is clear that the only common thread in both sets of proceedings is that the parties are the same. That is hardly a common question of fact. The main rationale for ordering cases to be heard together is to ensure an efficient hearing of related actions to save costs, time and effort and for reasons of convenience.

[32] It is undisputable that the two actions are not related actions as there is no nexus between them. According to the authorities on the subject, such

nexus is required before cases can be heard together. I therefore overrule the defendants objection as it is not possible for an OS and writ action to be heard together in the absence of a direction from the Kuala Lumpur High Court for the OS to be converted into a writ action.

Whether High Court has jurisdiction or power to order DNA tests to determine paternity

[33] Apropos this issue, it is common ground that there is no legislative provision in this country on the power of the High Court to order DNA tests to determine paternity. The United Nations Convention on the Rights of the Child cannot on its own create a remedy that is not found in the legislation.

[34] Absent statutory power, the question arose in *Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik* [2013] 4 MLJ 272, whether the High Court is empowered to order DNA tests under its inherent jurisdiction to determine paternity. There, the plaintiff who was the natural mother of the child alleged that the defendant was the child's natural father and wanted the court to order him to undergo DNA testing to determine the issue. In allowing the application, Zamani Rahim J held that the High Court has the jurisdiction or power to order DNA testing under its inherent jurisdiction.

[35] Coming back to the instant case, both parties' counsel are in agreement that a judge of the High Court has inherent power to order DNA testing in disputed paternity cases. I accept the concession of law made by counsel. It is well known that inherent jurisdiction is a jurisdiction of long standing which has been used in a wide variety of ways to augment statutory powers and is resorted to in cases where the absence of a remedy would lead to injustice and leave individuals bereft of a remedy.

[36] Accordingly, I find that the court has inherent power to order DNA testing in disputed paternity cases.

Test applicable in determining when DNA test ought to be ordered

[37] The Indian Supreme Court has held that DNA tests in paternity cases should not be ordered routinely but only in deserving cases. It has further held that the court should exercise such a power to order DNA testing only if the applicant has a strong prima facie case and there is sufficient material before the court. See *Bhabani Prasad Jena v Convenor Secretary, Orissa State Commission for Women & Anr* (2010) 8 SCC 633 and *Dipanwita Roy v Ronobroto Roy* (2015) 1 SCC 365.

[38] In the recent Malaysian case of *CAS v MPPL & Anor* [2019] 4 MLJ 243, the Court of Appeal considered whether DNA testing can be ordered in respect of a child born or conceived in wedlock by reason of the presumption of paternity in s 112 of the Evidence Act 1950. The plaintiff there claimed that he was the biological father of the child, and filed an originating summons praying for, inter alia, the court to order a DNA test to determine the child's paternity. The plaintiff claimed that he had been having an affair with the first defendant even before her marriage to the second defendant, and that this affair continued even after the defendants' marriage. The plaintiff claimed that when the child was born, he had lived periodically with the first defendant and child as a family, when the second defendant was on flight duty. The plaintiff also alleged that he had been paying monthly maintenance and had access to the child until the first defendant ended their relationship.

[39] The High Court dismissed the plaintiff's application and he appealed. In allowing the appeal, Nallini Pathmanathan JCA cited with approval the following passage in judgment of Ravindra Bhat J in *Rohit Shekhar v Narayan Datt & Anor* (FAO(OS) No 547/2011):

> 23. The right of the child to know of her (or his) biological antecedents is now recognised internationally as being of critical importance. Major international instruments such as the UN Declaration on Human Rights have recognized the rights of a child irrespective of her (or his) legitimacy and the Convention on the Rights of Child, 1990 has expressly specified a right to knowledge of parenthood.
>
> 24. The Convention therefore, specifically requires that as far as possible, the State must enable the child to know of his true paternity ...
>
> 25. A child's right to know of her or his biological parentage has had a critical influence also in many developments in Europe that have led to lifting the anonymity of a donor in assisted pregnancies and in case of sperm donors. Such donors remained anonymous in Europe till the 1980s. However, later developments mark a shift from the anonymity based approach, and the Courts, tend to lean in support of the child's right to know her or his biological antecedents. Similar laws have been passed in many countries all over the world (such as Sweden in 1985, following which almost all of Europe with the latest addition of the United Kingdom has followed suit) ... *These developments all over the world indicate that there is a very tenable argument in the child's interests that support its right to know the truth of its origin*. (Emphasis added.)

Her Ladyship then went on to add:

> We do not see why the aforementioned principles are not applicable in Malaysia. As we have already held, s 112 of the EA does not bar enquiries into paternity yet, at the same time, conclusively presumes legitimacy. Enquiries per se into paternity do not in this sense illegitimise a child. Thus, this emphasis on the fear of illegitimising the said child is not the determining factor when deciding to order a DNA test to determine paternity. Instead, the best interest of the child to know its biological parents is the larger concern ...

> In determining whether a paternity test ought to be ordered, the court must have regard to the best interests of the child. 'Best interests' here refers to the right of the child to know who his or her biological parents are ... When the factual disputes have been determined, the trial court can then go on to balance the competing interests of paternity and legitimacy and arrive at a fair and just determination of the matter. As matters stand, the plaintiff has been effectively deprived of the right to be heard fully; and ... we determined that no matter the parties' personal convictions, it is in the best interests of child C that is the determinative factor.

[40] It is clear from the foregoing case that the test in relation to DNA testing in paternity cases is child-centric and responsive to the needs of children. The child's interests must be the touchstone. A DNA test can be ordered whenever it is in the best interests of the child to do so. It bears mention that in cases involving children it has become usual for legal practitioners to use the best interests of the child language of the UNCRC rather than the welfare of children language of the statute, though both connote the same obligation.

Whether DNA testing ought to be ordered in this case

[41] Obviously, therefore, an order for DNA test can be directed by the court in this case if the plaintiff shows that he has a strong prima facie case that he is the biological father, and more importantly that it is in the best interests of the child to do so.

[42] It is apposite to point out that in *CAS v MPPL & Anor*, one of the reasons the Court of Appeal did not allow the plaintiff's OS for a DNA test was because there were serious factual issues as the first defendant denied she was in an adulterous relationship with the plaintiff. In this regard, the court observed:

> In allowing the plaintiff's appeal, we were of the view that the plaintiff's amended OS in encl 5 had to be converted into a writ action. In our reading of the affidavits in this action, it is as plain as pikestaff that the defendants deny many of the allegations made by the plaintiff in respect of his purported relationship with the first defendant and child C. These are crucial matters. The plaintiff's claim ought not to have been dismissed outright in the absence of judicial determination on these crucial issues. Such determination can only be made with full *viva voce* evidence.

[43] This is not the case here. The plaintiff has a strong prima facie evidence that he is the biological father. The biological mother's email, and affidavit constitute compelling evidence that she and the plaintiff had a sexual relationship to say the very least. The plaintiff did have sex with the biological mother at about the time of the child's conception. In her email to the adoption agency the birth mother complains that the biological father has been harassing her incessantly for the child. The plaintiff has produced adequate corroborative

A evidence to show that there is a good possibility that he is the birth father, and only a DNA test can confirm conclusively the veracity of his claim.

[44] The next question that arises for consideration is whether it would be in the best interests of the child to order a DNA test since he has been adopted and has lived with the defendants the last six years. Undoubtedly, various competing factors must be weighed in determining the best interests of the child.

[45] The defendants contend that it would not be in the best interests of the child to order a DNA test as it will have adverse effects on the child who has become attached to them and they are the only parents he has known. I think it is difficult to speculate if a DNA test would indeed have adverse effects. It is possible that as the child develops emotionally and cognitively, he may have a different reaction to the adoption and may have some difficulty coming to terms why his adoptive parents have kept him away from his birth father. Conversely, the child may also struggle with the fact that he was rejected by his biological parents.

[46] The defendants also take the position that it would be futile to order DNA testing as the plaintiff has no legal standing to challenge the adoption order as the rights of the birth parents are terminated by law, upon adoption. It is true that by reason of s 9 of the Adoption Act the parental rights of the birth parents of the child have been terminated, but it is a matter of essential justice not to overlook that the adoption order was made in the plaintiff's absence and without giving him the opportunity to oppose the petition. The birth mother at the material time was aware that he had not relinquished his rights to the child and that he was looking for him, but she failed to disclose this vital information to the court. It is difficult to understand the angst and turmoil the plaintiff must have undergone when he was unable to have any contact with the child.

[47] In this connection, I refer to the dictum of Payne J in *Re Barraclough* [1967] P 1 where His Lordship held (at 11):

> The fundamental principle therefore is that a party should be bound by the decision if he has had an opportunity to appear and oppose the proceedings. But if by some unavoidable accident ... a defendant has been prevented from coming to the court and opposing the proceedings, it does seem to me that the court would in the interests of justice ... put the matter right. It would lead to a grave injustice if a decision ... could not be put right although by mistake or by accident it had been given in the absence of somebody who genuinely wished to come to court and oppose it.

[48] I must therefore express my disagreement with the defendants that because of the adoption order, no DNA test ought to be directed in this case. A

[49] Articles 7 and 8 of the UNCRC mandate that a child has a right to know and be cared for by his birth parents. I do not believe that a child's best interests lie in depriving its biological father or mother of their right to consent to his adoption. In adoption cases, it is necessary to undertake all possible measures to ensure a balance, within the adoption triangle, of the rights of the biological parents, the adoptive parents and the children themselves. Pursuant to s 5(1) of the Adoption Act there are three categories of persons from whom consent has to be obtained before an adoption decree can be made. The consent of the birth father of his illegitimate child could come under the category of 'a person who is liable to contribute to the support the child' by reason of s 3(2) of the Married Women and Children (Maintenance) Act 1950 which imposes a statutory duty on a father to support his illegitimate child. I am mindful that whilst the birth father has a right to object to the adoption of his child, the court is empowered under the proviso to s 5(1) of the Adoption Act to dispense with his consent where the latter has refused to contribute to support the child. B C D

[50] Against this background, I find that if indeed the plaintiff is the biological father, permitting the adoption of the child without his consent would represent a denial or interference with his rights to raise the child and the child's right to be raised by his biological father. It bears reiteration that the biological mother gave up the child for adoption without notice to the plaintiff knowing very well that he was looking for the child. As noted earlier in *Sean O' Casey Patterson v Chan Hoong Poh & Ors*, the Federal Court held that the Guardianship of the Infants Act applies to all children, legitimate as well as illegitimate. Neither the father nor mother has a superior right to the custody of a child. In the circumstance, I do not see how it can be argued that as the adoption order is not open to challenge, a DNA test would not be in the best interest of the child. E F G

[51] That brings me to the defendants submission on estoppel. It is true that the plaintiff has made previous applications for the child to undergo DNA testing, but those applications were either withdrawn or struck out without being heard on the merits. It is also true that on 28 July 2021, the Shah Alam Sessions Court had dismissed the plaintiff's application for a DNA test and for the adoption order to be set aside with no liberty to refile the same, but it is relevant to note that this said order was made as the learned sessions judge expressed the view she had no jurisdiction to hear the same. The plaintiff's application was never adjudicated on the merits by the learned sessions judge. As such, I do not see how estoppel applies in favour of the defendants because estoppel only prohibits a cause of action from being re-litigated between the same parties. The defendants submission on estoppel is untenable. H I

[52] There is one other important factor in this equation. It will be recalled that the biological mother has averred in her affidavit that she does not know the identity of the biological father as she was dating other men besides the plaintiff at the material time. If this is so, it is obvious that only a DNA test would resolve this issue. The Australian High Court in *G v H* (1994) 181 CLR 387; (1994) 124 ALR 353; (1994) 18 Fam LR 180 Brennan and McHugh JJ said, at p 391 (CLR); p 356 (ALR); p 183 (Fam LR) observed:

> We do not suggest that paternity is not a serious issue. It is serious because paternity carries with it both significant privileges and grave responsibilities, only some of which relate to monetary obligations. The attribution of paternity may be seen by a child's mother to be no more than the means of procuring a maintenance order during the child infancy, but a finding that a particular man is the child's father might well be of the greatest significance to the child in establishing his or her lifetime identity ...

[53] In my opinion, even if the defendants are correct in their submission they make the adoption order cannot be challenged in view of *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137; [2011] 3 CLJ 722 (para [16]), I fail to see why a DNA test cannot be ordered at this stage. If the results of the DNA test do in fact show the plaintiff to be the birth father, this information need not be published or disclosed to the child, but at least this information is available if and when the child seeks for it at a future date.

[54] In the present case, I am of the considered opinion that taking the totality of the facts and circumstances of the case into account, it would be in the best interests of the child to order a DNA test. The advances in science from blood tests to the DNA testing now available indicate the tremendous scientific advances made in this field. The blood test procedures previously employed to determine paternity, which in itself could be invasive has now been replaced with new techniques by the provision of genetic material such as mouth-swabs and hair analysis ensuring virtually no physical invasion at all.

CONCLUSION

[55] I accordingly direct that it is in the interests of justice that a DNA test be carried out to determine if the plaintiff is the birth father, and I am satisfied that it is a proper exercise of the court's inherent jurisdiction to secure this outcome. I further order that the plaintiff be declared as the birth father if the test shows that he is the father.

Order accordingly.

Reported by Ahmad Ismail